not disturb the findings of the lower court. It is of course the duty of an appellate court to be a judge of fact as well as of law. At the same time it would be abrogating its function if it made a hard and fast rule never to interfere with the findings of fact and felt bound to support a judgment which, on review of all the evidence, it considered to be clearly wrong. The learned judge had given his reasons for disagreeing with the SAR.

We find that we agree with the view of the learned judge that the claimant had been able to establish that they were the lawful owners of the attached properties. Accordingly, we support the learned judge in dismissing the appeal.

Appeal dismissed.

Solicitors: *Lim Seong Chun & Co*; *SA Lingam & Co.*

Reported by *Prof Ahmad Ibrahim*

Ting Chong Maa v Chor Sek Choon

HIGH COURT (IPOH) – CIVIL SUIT NO 22-223-1987
PEH SWEE CHIN J
31 JANUARY 1989

Companies and Corporations – Locus standi of shareholder to sue director of company – Shareholder and director own equal shares in company – No majority or minority shareholder – Determination of who controls the company – Includes de facto control – Exceptions to rule in Foss v Harbottle – Whether shareholder has locus standi

In this case, the plaintiff (the shareholder of a company) and the defendant (the director) both own the equity of the company equally. The plaintiff had alleged that the defendant had obtained secret profits by diverting the company's customers to another firm and the plaintiff therefore claims accounts and inquiries and payment of sums found due thereon. The defendant applied for the statement of claim to be struck out on the ground that the plaintiff had no locus standi to file the present action. The main issue for the court to decide was therefore whether a shareholder of a company had locus standi to sue, for the company, a supposedly erring director of the company.

Held, dismissing the defendant's application:

(1) The leading case of *Foss* v *Harbottle*[1] testifies to majority rule in companies by holding to the effect that an individual shareholder of a company cannot sue, for a wrong done to the company, in his individual name on the grounds that the company is the true and proper plaintiff and that, in any event, the alleged wrong could be, if need be, ratified by a simple majority of members.

(2) The rule in *Foss* v *Harbottle*[1] has, however, three exceptions. The three exceptions are acts which in effect cannot be ratified by the majority shareholder at a general meeting. They are: (a) any act which is ultra vires the company; (b) any act which is a fraud on the minority and the alleged wrongdoers control the company; and (c) an act which can only be effective if resolved by a special resolution and which is resolved by a simple majority.

(3) In the present case, both the plaintiff and the defendant own the issued capital in equal shares. There is no clear majority so that the plaintiff cannot be in truth a minority shareholder nor the defendant a majority shareholder. However, being a majority or minority shareholder is not a conclusive test, for what the second exception to the rule in *Foss* v *Harbottle*[1] requires is that the alleged wrongdoer be in control. In the instant case, the defendant has been the managing director; other things being equal, he would prima facie have de facto control of the company. Control here should include de facto control though the defendant has less than a clear majority of shares.

(4) The averments in the statement of claim prima facie suggest a fraud on the minority. For the reasons stated above, the plaintiff has the locus standi to maintain this action.

[*Obiter*: The learned judge made the following comments after ruling on the main issue in the case: (a) when there are more than two shareholders, the plaintiff in suing for a wrong done to his company and bringing himself within an exception to the rule in *Foss* v *Harbottle*[1] ought to sue in a representative capacity on behalf of himself and all other shareholders or members other than the real defendant or defendants under O 15 r 12 of the Rules of the High Court 1980; (b) it is at least desirable, if not essential, that a company in an action similar to the present be made a co-defendant, since it cannot be a plaintiff as both of its two vital organs, viz board of directors and general meeting, would not authorize such court action.]

Cases referred to

1 *Foss* v *Harbottle* [1843] 2 Hare 461; 67 ER 189 (refd)
2 *Edwards* v *Halliwell* [1950] 2 All ER 1064 (refd)

Legislation referred to

Companies Act 1965 s 181(i)(a)
Rules of the High Court 1980 O 15 r 12

Loh Yew Dong for the plaintiff.
Lau Cheong for the defendant.

Cur Adv Vult

Peh Swee Chin J: Once again, a point of fairly frequent controversy has cropped up before me. I told counsel I would deliver a short written judgment and here I do.

The point in question is that of a shareholder of a company suing, for the company, a supposedly erring director of the company but is faced with an immediate objection from the director that such action is not competent, or as is stated in the present case, that plaintiff has no locus standi.

The shareholder, ie the plaintiff, and the director, ie the defendant, both own equally the equity of the company. The plaintiff, in a nutshell, alleges that the defendant has obtained secret profits by diverting the company's customers to another firm. The plaintiff claims therefore accounts and inquiries and payment of sums found due thereon.

By summons, the defendant has applied for the statement of claim to be struck out on the ground that the plaintiff has no locus standi to file the present action, and in the alternative, on grounds which I need not deal with as no argument was advanced by both parties on them; neither was anything stated in any affidavit in regard to them. The real bone of contention has therefore been the question of locus standi.

Certain principles, relevant to this case, have to be briefly stated first. There is also that kind of democracy of rule by the majority in companies except that the rights and remedies of minority shareholders are fairly and adequately set out in our Companies Act. Since shareholders of the company exercise their control over the company through general meetings, they can bring about the appointment and removal of directors. Therefore the majority shareholders in effect control the directors. If the directors are supported by such majority shareholders, the minority shareholders are therefore rendered to being either spectators or victims. The leading case of *Foss* v *Harbottle*[1] testifies to this majority rule by holding to the effect that an individual shareholder of a company cannot sue, for a wrong done to the company, in his individual name on the grounds that the company is the true and proper plaintiff and that in any event, the alleged wrong could be, if need be, ratified by a simple majority of members, in other words, the majority shareholders should be left to decide whether to commence proceedings against the miscreants, viz the misbehaving directors.

I pause to observe that the rule in *Foss* v *Harbottle*[1] applies to actions filed expressly or from their nature, impliedly by minority shareholders for the benefit of their company as in the instant case. It does not apply to actions by shareholders in their own names for direct infringement of their personal rights qua shareholders which are usually conferred by the Companies Act; to cite just one example, a shareholder of a company has a right to petition for winding up of the company on the ground that the affairs of the company are being conducted in an oppressive manner under s 181(i)(a) of the Companies Act 1965. An action of this kind concerning the infringement of the personal rights of a shareholder is also an internal fight or dispute in substance between a shareholder and his company, for an alleged wrong done to the shareholder by the company, and not the other way round as in this case.

The rule in *Foss* v *Harbottle*,[1] however, has given rise, through the cases to three exceptions, ie when a shareholder of a company can sue in his own name for the benefit of the company. The three exceptions are acts which, in effect, cannot be ratified by the majority shareholders at a general meeting. They are (1) any act which is ultra vires the company, extending to any illegal act it being not necessary that it must be always an act ultra vires the memorandum or articles of association of the company: please see *Edwards* v *Halliwell*;[2] (2) any act which is a fraud on the minority, and that the alleged wrongdoers control the company; and (3) an act, which can only be effective, if resolved by a special resolution (which is more than a simple majority) and which is resolved by a simple majority.

The instant case, however, is not true to type; for both plaintiff and defendant own the issued capital in equal shares. But for this aberration, if the plaintiff were a minority shareholder and the defendant a majority shareholder, the averments in the statement of claim would prima facie suggest a fraud on the minority and the defendant, being the alleged wrongdoer, and being also a majority shareholder, would be in control, this case would have fallen neatly within exception no 2 to the rule in *Foss* v *Harbottle*,[1] and the plaintiff would have the locus standi on the assumed basis of the plaintiff being a true minority shareholder.

I deal now with what I call the aberration. There is no clear majority so that the plaintiff cannot be in truth a minority shareholder nor the defendant a majority shareholder. However, in my view, being a majority or minority shareholder is not a conclusive test, for what the said exception no 2 says is that the alleged wrongdoer is in control. In the instant case, the defendant has been the managing director, other things being equal, he would prima facie have de facto control of the company. Control here should, in my view, include de facto control though the defendant has less than a clear majority of shares.

For the reasons stated above, the plaintiff has the locus standi to maintain this action, which was filed properly. I therefore dismiss the defendant's application, with costs to the plaintiff in any event.

Before departing from this case which has one unusual feature of having two shareholders owning equal shares in the company, I wish to point out that when there are more than two shareholders, the plaintiff in suing for a wrong done to his company, and bringing himself within an exception to the rule in *Foss* v *Harbottle*,[1] ought to sue in a representative capacity on behalf of himself and all other shareholders or members other than the real defendant or defendants under O 15 r 12 of the Rules of the High Court 1980. There are two advantages, first, any judgment given will be res judicata as regards members so represented, and secondly, the members so represented are not liable for costs. All such members would be liable for costs if they join as plaintiffs.

I wish to further point out that it is at least desirable, if not essential, that a company in an action similar to the present be made a co-defendant, since it cannot be a

plaintiff as both its two vital organs, viz board of directors and general meeting, would not authorize such court action. As a defendant, any judgment may be given in its favour when the defendant company is in a position to counterclaim from the real defendants, if not, it will be at least res judicata for the company and this will prevent subsequent emerging majority shareholders, if any, from starting another action again against the 'real' defendants.

Application dismissed.

Solicitors: *Loh Yew Dong & Co; Albar, Zulkifly & Yap.*

Reported by *Ng Sheau Jiuan*

Malaysian Resources Credit & Leasing Sdn Bhd v AK Construction Sdn Bhd & Ors

HIGH COURT (KUALA LUMPUR) – SUIT NO C1-23-3643-86
GUNN CHIT TUAN J
24 JANUARY 1989

Contract – Termination of lease agreement by plaintiff – Whether termination was in accordance with terms of agreement – Whether plaintiff's letter of demand constituted notice in writing – No provision in agreement for notice in writing to be in any specific form

By a lease agreement made between the plaintiff and the first defendant, the plaintiff agreed to lease to the first defendant certain goods upon the terms and conditions of the lease agreement. By a guarantee agreement, the second and third defendants guaranteed the plaintiff for the due performance by the first defendant of all obligations due under the lease agreement. The first defendant defaulted in payment of the lease rentals and the plaintiff obtained summary judgment against the defendants for the lease rentals payable under the lease agreement. The defendants appealed to the High Court, contending that the plaintiff had not duly determined the lease agreement in accordance with cl 9 of the agreement, there being no notice in writing to the lessee of the determination.

Held, dismissing the defendants' appeal:

(1) The lease agreement merely provides that it shall be lawful for the lessor, by notice in writing to the lessee, to determine the lease in certain circumstances including default in payment of the rent instalments on their due dates, but does not provide that the notice in writing should be in any specific form.

(2) The plaintiff's letter of demand to the defendants dated 22 August 1986 was a sufficient notice in writing to the defendants and stated that if they failed to pay the outstanding instalments of rent together with interest on the overdue sum at the rate of 27% pa within the stipulated period, then the lease agreement would be deemed to be terminated.

(3) As the lease agreement had been duly determined by a notice in writing in accordance with cl 9 of the agreement, there was no triable issue.

[*Editorial Note*: The defendants have appealed to the Supreme Court vide Civil Appeal No 03-16 of 1989.]

Chia Loong Thye for the defendants.
Kamilah Kassim (Miss) for the plaintiff.

Cur Adv Vult

Gunn Chit Tuan J: The plaintiff abovenamed had applied for an order by way of summons-in-chambers dated 3 August 1987 that it may be at liberty to enter final judgment against the defendants for a sum of $255,030.30 together with interest thereon at the rate of 27% pa from 11 September 1986 to the date of realization and costs.

By a lease agreement in writing dated 1 June 1984 made between the plaintiff and AK Construction Sdn Bhd (the first defendant), the former agreed to lease to the latter certain goods upon the terms and conditions of the said lease agreement.

By a guarantee agreement, one Adnan bin Haji Manidin and Khoo Tian *alias* Chiu Er Yeh (the second and third defendants respectively) jointly and severally guaranteed the plaintiff for the due observance and performance by the first defendant of all sums due and all obligations under the said lease agreement.

The first defendant defaulted in payment of the lease rentals from April 1986 to September 1986 which amounted to $105,840. By reason of the default of the lease rental payment it was averred that the plaintiff had unilaterally duly determined the lease agreement and claimed against the first defendant for the sum of $255,030.30, being total lease rentals payable under the aforesaid lease agreement, particulars of which are as follows:

Particulars

Rentals outstanding (April 1986 to September 1986)	$ 105,840.00
Rentals receivable (October 1986 to May 1987)	$ 141,120.00
Interest on outstanding sum as at 10 September 1986 and still continuing	$ 8,070.30
	$ 255,030.30

Mr Chia, counsel for the defendants, stated that the only issue in this appeal from the decision of the learned senior assistant registrar who on 10 May 1988 had granted summary judgment against the defendants for the said sum of $255,030.30 together with interest thereon at the rate of 27% pa from 11 September 1986 to the date of realization and costs, was the defendants' contention that the plaintiff had not duly determined the said agreement in accordance with its terms. Counsel then